No. 89-1584

In The

Supreme Court of the United States

October Term, 1989

DEAN WITTER REYNOLDS INC. and JEFFREY HINES,

Petitioners,

v.

FLORABELLE COFFEY,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I. A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF THE SIGNIFICANT CONFLICT AMONG THE CIRCUITS.[1]

The question presented in the Petition is whether the Tenth Circuit majority opinion gives proper effect to the

[1] "Petition" refers to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Dean Witter Reynolds Inc. and Jeffrey Hines ("Dean Witter"). "App." refers to the Appendix to the Petition. "Resp." refers to Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Respondent Florabelle Coffey.

rescission of Rule 15c2-2. Respondent "concedes that there is a conflict among the circuits as to the effect of the recision [sic] of the Rule 15c2-2 upon agreements to arbitrate broker/customer disputes." (Resp., p. 5.) Accordingly, the parties are in agreement that the circuits are divided over the precise issue before this Court.

That conflict has been heightened by the recent decision of the Ninth Circuit, *Paulson v. Dean Witter Reynolds, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶95,296 (9th Cir., June 5, 1990), issued nearly two months after Dean Witter filed its Petition. The impact of the *Paulson* decision on the question presented by Dean Witter is significant. *Paulson* presents operative facts which are essentially identical to those of this case, yet the court reaches the opposite conclusion:

> The rescission of SEC Rule 15c2-2 has been given a retroactive effect by other courts in claims arising under the Securities Exchange Act of 1934 [*citing Jeske v. Brooks*, 875 F.2d 71 (4th Cir. 1989); *Adrian v. Smith Barney, Harris Upham & Co., Inc.*, 841 F.2d 1059 (11th Cir. 1988); and *Villa Garcia v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 833 F.2d 545 (5th Cir. 1987)]. *But see Coffey v. Dean Witter Reynolds, Inc.*, 891 F.2d 261, 265 (10th Cir. 1989) . . . ; *Ballay v. Legg Mason Wood Walker, Inc.*, 878 F.2d 729 (3d Cir. 1989). . . . We find the cases applying the rescission of SEC Rule 15c2-2 retroactively to be persuasive and consistent with the Supreme Court's decision in *Rodriquez de Quijas*.

Paulson, [Current] Fed. Sec. L. Rep. (CCH) ¶95,296 at 96,372. *Paulson* underscores the conflict among the federal circuits concerning the effect of the rescission of Rule

15c2-2. A writ of certiorari should issue to resolve this conflict.

II. UNLESS THIS COURT RESOLVES THE CONFLICT AMONG THE CIRCUITS, DOZENS OF FEDERAL DISTRICT AND CIRCUIT COURTS WILL FOR YEARS TO COME WRESTLE WITH THE EFFECT OF THE RESCISSION OF RULE 15c2-2 UPON ARBITRATION AGREEMENTS.

Until this Court resolves the conflict among the circuits, lower courts will continue to wrestle with the effect of the rescission of Rule 15c2-2 on arbitration agreements. Contrary to Respondent's conclusion, the number of cases impacted by this question is by no means "minimal." (Resp., p. 3.) As demonstrated in the first footnote of Dean Witter's Petition, 32 United States District Court decisions have already struggled to determine the effect of the rescission of Rule 15c2-2 in the 30 months between the time the Rule was rescinded and the filing of Dean Witter's petition.[2] Respondent's gratuitous conclusion that "none of the customer agreements involved

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[2] In the 3½ months since Dean Witter filed its Petition, 4 more United States District Court decisions concerning the effect of the rescission of Rule 15c2-2 have been reported. *See Leonard v. Stuart-James Company, Inc.*, No. 1:89-CV-2051-JOF (N.D. Ga. June 23, 1990) (LEXIS, Genfed library, Dist file); *Caleel v. Curry*, No. 87 C 8155 (N.D. Ill. May 2, 1990) (LEXIS, Genfed library, Dist file); *Tauber v. Prudential-Bache Securities, Inc.*, [Current] Fed. Sec. L. Rep. CCH ¶95,226 (D.C. Md. April 4, 1990); *Kelly v. Robert Ainbinder & Co.*, [1989-1990 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶94,963 (S.D.N.Y. March 8, 1990).

contained a clause in the contract between the parties incorporating any rules or regulations (such as Rule 15c2-2)" is not only unsupported (Resp., p. 6); it is based on a misreading of the Tenth Circuit's majority opinion. The issue is the effect of the rescission of Rule 15c2-2, not the impact of paragraph 2 of the Customer's Agreement.[3]

Nor do any statutes of limitations shorten the potential life of this conflict. The statutes of limitations applying to federal securities law claims run from the time of an alleged violation, which may not occur for many years. Arbitration agreements executed prior to or during the time Rule 15c2-2 was in effect will continue to govern the rights of customers and brokers with respect to such

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[3] Respondent erroneously contends that the Tenth Circuit majority opinion is based upon the application of paragraph 2 of the Customer's Agreement. (Resp., pp. 3-4). The Tenth Circuit majority opinion declines to apply the rescission of Rule 15c2-2 retroactively because it concludes that the rule itself mandated modification of the arbitration clause, and that because of such modification, Coffey had a reasonable expectation that she could litigate federal securities law claims.

> In this situation, like the *Ballay* court, we see no reason to defeat Coffey's reasonable expectation, based on the clear, unequivocal language of the Rule 15c2-2 – mandated modification of the arbitration clause, that she could litigate federal securities law claims under the joint account. At the time Coffey commenced the instant litigation Rule 15c2-2 was in effect. The notice required by Rule 15c2-2 added a new paragraph to the parties' contract.

(App. A-12). Even if Respondent were correct that the arbitration agreement was modified by operation of paragraph 2 to incorporate the Rule 15c2-2 notice, it would have likewise been re-modified by the rescission of Rule 15c2-2.

future claims. Applicable statutes of limitations do *not* run from the date of the rescission of Rule 15c2-2. Accordingly, if the conflict over the effect of the rescission of Rule 15c2-2 is left unresolved, its longevity is unlimited and the answers to the question presented in the Petition will vary from one circuit or district to the next.

CONCLUSION

Because this Court's guidance is essential to reconciling the differing opinions of the federal circuits, some of which resurrect a mistrust of arbitration, a writ of certiorari should issue to review the judgment and decision of the Court of Appeals.

Respectfully submitted this 27th day of July, 1990.

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